BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS C. DILULO, Claimant, v. ANDERSON & WOOD CONSTRUCTION COMPANY, INC., Employer, and AMERICAN CASUALTY COMPANY OF READING, Surety, Defendants.	)	**IC 00-038118** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** Filed October 7, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise, Idaho, on May 19, 2005. Claimant was present and represented himself. Mark C. Peterson of Boise represented Employer/Surety (Defendants). Oral and documentary evidence was presented. No post-hearing depositions were taken, but the parties submitted post-hearing briefs. This matter came under advisement on August 22, 2005, and is now ready for decision.

ISSUE

By agreement of the parties, the sole issue to be decided is whether Claimant is entitled to additional medical benefits arising from an industrial accident causing injury occurring on November 29, 2000.

CONTENTIONS OF THE PARTIES

Claimant contends that he injured his cervical, thoracic, and lumbar spine in November 2000 when he was thrown around inside the open cab of a backhoe. He seeks further medical treatment for his injuries.

Defendants contend that the injuries Claimant received in the backhoe incident had long ago resolved and his treating physician released him to return to work without restrictions or impairment. Further, Claimant, who was a lineman on high power lines, was subsequently involved in a serious electrical shock accident that produced whole-body symptoms including neck, thoracic, and back pain. Finally, Claimant settled his electric shock claim and in so doing, he and others admitted he was in "perfect health" prior to that accident and he cannot now argue otherwise.

Claimant responds that he was not in perfect health prior to the electric shock accident and, in fact, his back has continuously bothered him since an industrial accident in 1994. Further, he was merely following the advice of his then attorney regarding how to best approach settling his electric shock claim and by the time the Lump Sum Settlement Agreement was prepared he was representing himself and never even read the agreement that indicated all of his current problems were caused by that incident. Finally, Claimant is an honest, hard working man who simply wants to find out what is wrong with his back, get it fixed, and get back to work to support his family.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his friend, Brad Russell, presented at the hearing;
2. Claimant's Exhibits A-I admitted at the hearing; and,

3. Defendant's Exhibits A-R admitted at the hearing.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 41 years of age and resided with his wife and family in Meridian, Idaho, at the time of the hearing. He has been in power line construction for the past 19 years, both as a worker and as a working foreman. He described the work as "high, hard, and heavy." The Referee finds that Claimant was a hard worker who took much pride in his profession and in his ability to provide for his family.

2. Claimant initially injured his back in an industrial accident in 1994. He has received chiropractic care intermittently since that time due to the strenuous nature of his work.

3. On November 29, 2000, Claimant injured his neck, back, and rib cage when he was thrown around inside the open cab of a backhoe that had tipped up on two wheels and came down hard. Surety accepted the claim.

4. Claimant was referred by his chiropractor to Steven Rudd, M.D., an orthopedic surgeon. Dr. Rudd first saw Claimant on December 13, 2000. Dr. Rudd noted that Claimant had a history of mild back pain but, " . . . has been fully active as foreman supervising power line installation." Claimant's Exhibit F. He further noted that Claimant had multiple level disc disease not seen in most people his age probably due to the heavy physical labor he had performed over the past 15-20 years. Dr. Rudd diagnosed cervical and thoracic ligamentous muscle strains with a nondisplaced left 8th rib fracture, significant multi-level lumbar degenerative disc disease, and a "possible" acute L4-5 left sided disc protrusion with lateral

stenosis. Dr. Rudd limited Claimant to supervisory work only for six hours a day and prescribed physical therapy.

5. Claimant completed physical therapy and on January 25, 2001, Dr. Rudd released Claimant to a full 10-12 hour day with a 50 pound lifting restriction. In responding to a surety inquiry regarding apportionment, Dr. Rudd wrote, " . . . I am not aware of any scientific guidelines that describe how to apportion preexisting factors." *Id*.

6. On April 12, 2001, Claimant returned to Dr. Rudd at Surety's request for an impairment rating. At that time, Dr. Rudd noted that Claimant had been released to full, unrestricted work without impairment. However, he further noted, "The canal is narrowed but not enough to warrant surgery, however, I believe that the injured disc came from the accident and we should be very cautious about the prognosis in Mr. Dilulo's case. Specifically, he could break down the disc and rupture it in personal activities at home or even reasonable recreational activities, and I believe that a provision needs to be made to cover any future problems with the L4-5 disc that Mr. Dilulo should develop." Defendant's Exhibit I.

7. Claimant returned to his strenuous work as a lineman and did not seek any medical treatment for his back until after he suffered the electric shock accident on May 10, 2002. At that time, Claimant was holding three un-energized wires that suddenly became energized resulting in 7200 volts of electricity entering Claimant's body. He suffered burns requiring plastic surgery, whole-body aches and pains, and certain neurocognitive difficulties. His medical course has been long and tortured and Claimant has expressed much frustration in the medical profession's seeming inability to properly diagnose and treat him. He has not worked since the 2002 accident.

8. On March 19, 2004, Claimant settled his claim regarding his electric shock accident by way of a Lump Sum Settlement Agreement in the amount of $210,000.00.

DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide **medical testimony** that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). No "magic" words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. *Paulson v. Idaho Forest Industries, Inc*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician's oral testimony is not required in every case, but his or her medical records may be utilized to provide "medical testimony." *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

9. In carefully reviewing the record, the Referee is unable to locate any physician's opinion stating unequivocally that Claimant is in need of any further medical care for **any** condition attributable to his November 29, 2000, accident. While Dr. Rudd indicated provisions should be made concerning the prognosis for Claimant's lumbar injury, he does not indicate that further care is **presently** required. The closest Dr. Rudd could come to answering that question is contained within his November 29, 2004, office note wherein he opines that an IME might be

in order to, " . . . put together his full medical history and reconcile the different points of view and the different physician opinions for final conclusion of any work compensation issues that are still unresolved." Claimant's Exhibit F. However, as correctly pointed out by Defendants, an IME is not treatment and, to this Referee's knowledge, there is no statutory or case law granting the Commission the authority to order an employer or surety to pay for an IME that they have not requested or that has not been shown to be necessitated by the accident for which the employer or surety is liable.

CONCLUSION OF LAW

Claimant has failed to provide medical evidence that he is entitled to further medical treatment for any condition that arose from his November 29, 2000, industrial accident.

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this __28th ___ day of __September___, 2005.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __7th ___ day of __October____, 2005, a true and correct copy of the **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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